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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ROBERT ADAMS et al., Plaintiffs and Appellants, v. STATE DEPARTMENT OF SOCIAL SERVICES et al., Defendants and Respondents.	C084990 (Super. Ct. No. 34-2012-00132399-CU-PO-GDS)

This case involves the closure of Creative Frontiers School, Inc. (Creative Frontiers), after an investigation revealed its principal, Robert Adams, sexually molested several children enrolled at the daycare.[1] Creative Frontiers, Robert, Saundra Adams, and Cynthia Higgins filed a complaint alleging the daycare's license was wrongfully revoked due to the conduct of defendant Department of Social Services, Investigator Lori

[1] For the sake of clarity, we refer to Robert by his first name due to his shared surname with Saundra Adams.

Rodriguez, and Marian Kubiak (collectively, State defendants),[2] and due to the conduct of defendants City of Citrus Heights (City), Detective Nicole Garring, Detective Joseph Rangel, Detective Jason Baldwin, Kim Beradi, and Stefani Daniell (collectively, City defendants). The trial court dismissed the case on grounds plaintiffs did not timely serve the complaint on any of the defendants.

On appeal, plaintiffs contend (1) the trial court erred in dismissing the case based on the three-year deadline period imposed by Code of Civil Procedure section 583.210;[3] (2) the trial court erroneously determined dismissal was also supported by the two-year deadline provided by sections 583.410 and 583.420, subdivision (a)(1); (3) defendants are equitably estopped from relying on these dismissal statutes; and (4) the trial court erred in refusing to grant plaintiffs' motion to set aside the judgment under section 473, subdivisions (b) and (d). The State defendants counter that Creative Frontiers lacks standing to sue because it is now a dissolved corporation.

We conclude Creative Frontiers has standing to pursue this appeal. We further conclude the trial court properly dismissed the action under section 583.210. There is no dispute plaintiffs served the complaint more than three years after filing it in superior court. Because dismissal was proper under section 583.210, we do not need to consider whether section 583.410 provided a redundant basis for the dismissal. We also do not address the equitable estoppel argument because plaintiffs did not first present it in the trial court. Finally, section 473 did not offer plaintiffs a vehicle for relief because that

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2 In their complaint and briefing on appeal, plaintiffs name Marian Kubiak as a defendant, apparently based on her conduct while acting as an employee of the State of California. The State defendants' briefing on appeal purports to represent only the Department and Investigator Rodriguez. We do not need to reconcile the unexplained omission in light of our conclusion the trial court properly dismissed the entire action.

3 Undesignated statutory references are to the Code of Civil Procedure.

provision applies to default judgments and judgments entered with clerical errors. This case presents neither situation. Accordingly, we affirm.

BACKGROUND

Robert was the principal of Creative Frontiers. In September 2011, Robert was arrested on multiple counts of sexually molesting children enrolled at Creative Frontiers.

In September 2012, plaintiffs filed – but did not serve – their complaint in which they alleged the defendants wrongfully revoked Creative Frontiers's license based on improper criminal investigation of sexual molestation at the daycare center. In March 2013, plaintiffs requested a stay of proceedings in this action while the criminal proceedings were pending against Robert. On March 28, 2013, the trial court issued an order that stated, in relevant part: "Plaintiff's request for stay is granted. This action is stayed until March 31, 2014 or until the criminal action is tried to verdict, whichever is earlier. Upon entry of verdict in criminal case, stay order is automatically dissolved."

In March 2016, Robert entered a plea of no contest to six counts of misdemeanor child sexual molestation. As the result of the plea, the Sacramento County District Attorney's Office issued a statement that read, in pertinent part: "By pleading no contest, the [trial] court found Adams guilty of the allegations that from 1998 through 2011 he molested six female students, whose ages ranged from 4 to 8 years old. The molestations occurred while on campus and during school hours. Adams' conduct included touching the bare chests of children under their clothes while they sat on his lap or when they were lying down during nap time." Robert was sentenced on April 1, 2016.

Plaintiffs served the complaint on the City defendants on July 22, 2016, and on the State defendants on July 21, and September 2, 2016. In December 2016, the City defendants moved to dismiss based on sections 583.210 and 583.410. Also in December 2016, the State defendants moved to dismiss based on the same statutes. The trial court granted the motions to dismiss under both sections 583.210 and 583.410.

In granting the motions to dismiss, the trial court found plaintiffs failed to show the defendants were not amenable to service at any time. Although a stay of proceedings had been granted at plaintiffs' request, the stay did not render service of the complaint impossible, impracticable, or futile. The trial court further found plaintiffs' concern that the civil proceeding would be negatively affected by the ongoing criminal proceeding against Robert could have been addressed by a request for a protective order. The trial court determined that "[t]here is no excuse for not serving the summons and complaint." The trial court also found the dismissal was separately supported by section 583.410 because the complaint was not served for more than two years after its filing. (§§ 583.410 & 583.420, subd. (a)(1).)

The trial court issued an order granting the State defendants' motion for dismissal on April 6, 2017, and an order granting the City defendants' motion for dismissal on April 10, 2017. On April 25, 2017, plaintiffs filed a motion to set aside the judgment based on section 473. After a hearing, the trial court denied the motion. The trial court entered a judgment of dismissal in favor of the State defendants on April 14, 2017, and a judgment of dismissal in favor of the City defendants on May 10, 2017. Plaintiffs timely filed a notice of appeal.

DISCUSSION

I

Creative Frontiers's Standing

At the outset, we consider the State defendants' assertion that Creative Frontiers lacks standing to appeal because it is now a dissolved corporation. We consider the State defendants' challenge because the issue of standing may be raised at any time. (*Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 672.)

The gravamen of the plaintiffs' complaint is the claim defendants conspired to wrongfully revoke the business license of Creative Frontiers so that plaintiffs, including Creative Frontiers, are entitled to monetary damages. The revocation of business license

occurred in July 2011. A Secretary of State certificate shows Creative Frontiers was dissolved in July 2018 by vote of its shareholders.[4] The State defendants assert the dissolution prevents Creative Frontiers from participating in the appeal. We conclude Creative Frontiers has standing to appeal even though it has been dissolved by its shareholders.

Dissolution of a corporation does not bar it from all further action. Corporations Code section 2010, subdivision (a), provides that "[a] corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, *prosecuting and defending actions by or against it* and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof." (Italics added.)

As the California Supreme Court has recognized, "Under our statutory scheme, the effect of dissolution is not so much a change in the corporation's status as a change in its permitted scope of activity. In *Boyle v. Lakeview Creamery Co.* (1937) 9 Cal.2d 16, [the Supreme Court] stated that the 'only purpose' of former Civil Code section 399, a predecessor of section 2010, was 'to stop further doing of business as a going concern, and limit corporate activities to winding up.' (9 Cal.2d at p. 20.) Thus, a corporation's dissolution is best understood not as its death, but merely as its retirement from active business." (*Penasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 1190 (*Penasquitos*).) In *Penasquitos*, the high court explained that "a claim for damages based on the corporation's predissolution activities is an affair of the corporation needing to be

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[4] We grant the State defendants' request for judicial notice of the Secretary of State certificate of dissolution number 2238628. (*Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1484 [noting that "this court has previously taken judicial notice of a certificate of corporate status"].)

wound up after the corporation's normal business activities have ceased. Participating in a judicial resolution of such claims is part of the winding-up process for which section 2010 expressly requires the dissolved corporation's existence to continue." (*Ibid*.)

Here, the gravamen of the plaintiffs' action is the claim that Creative Frontiers was wrongfully shut down by the defendants. Creative Frontiers may pursue its claim relating to this predissolution event as part of winding up its affairs because a successful claim would result in a monetary recovery that would directly affect the division of its final assets. Under *Penasquitos,* the dissolution of Creative Frontiers by its shareholders does not preclude Creative Frontiers from pursuing this action to its final resolution.

II

Mandatory Dismissal

Plaintiffs contend the trial court erred in dismissing their case under section 583.210 because the trial court's stay extended to service of the complaint on defendants. We disagree.

A.

Section 583.210

Section 583.210, subdivision (a), provides: "The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision, an action is commenced at the time the complaint is filed." If service is not made within the time specified in section 583.210, the mandatory dismissal provisions of section 583.250 come into play. Section 583.250 states, in pertinent part: "(a) If service is not made in an action within the time prescribed in this article: [¶] . . . [¶] (2) The action shall be dismissed by the court on its own motion or on motion of any person interested in the action, whether named as a party or not, after notice to the parties. [¶] (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

As relevant to this case, the three-year time limitation imposed by section 583.210, subdivision (a), is tolled during any period when "[t]he defendant was not amenable to the process of the court," "[t]he prosecution of the action or proceedings in the action was stayed *and the stay affected service*," or "[s]ervice, for any other reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control." (§ 583.240, subds. (a), (b), & (d), italics added.) The burden is on the plaintiffs to establish facts supporting an exception to the three-year mandatory dismissal provision of section 583.210. (*Perez v. Smith* (1993) 19 Cal.App.4th 1595, 1597.)

The time limitation on service provided by section 583.210 is intended "to give a defendant timely notice of the action so that the defendant can take adequate steps to preserve evidence. (17 Cal. Law Revision Com. Rep. (1984) pp. 905, 933.) 'The excuse of impossibility, impracticability, or futility should be strictly construed' to foster this purpose. (*Ibid*.) In contrast, the excuse should be liberally construed in connection with the time limits for bringing a case to trial. (*Ibid*.) The difference in the construction of the excuse in the two situations rests on the recognition that ordinarily a plaintiff exercising due diligence is in control of the time of service of summons, while a plaintiff is not ordinarily in control of bringing a case to trial. (*Ibid*.)" (*Damjanovic v. Ambrose* (1992) 3 Cal.App.4th 503, 510.)

B.

Analysis

The trial court properly dismissed the complaint under sections 583.210 and 583.240 after plaintiffs waited more than three years to serve their complaint on the defendants. The evidence is undisputed that plaintiffs did not serve their complaint within the time period specified in section 583.210, subdivision (a). The trial court correctly determined the March 28, 2013, stay did not apply to service of the complaint. The stay did not mention service of the complaint. Plaintiffs could have requested that

the stay be extended to encompass *service of the complaint*, but did not make such a request. Thus, there was no stay to toll the deadline to serve the complaint.

We reject plaintiffs' contention that the stay of the action necessarily included a stay of their obligation to serve the complaint on the defendants. As reflected in section 583.240, subdivision (b), the Code of Civil Procedure expressly differentiates between a stay of the action and a stay on service of a complaint. Thus, the trial court's stay of an action does not automatically stay service of a complaint. Here, the trial court's order provided: "This *action* is stayed until March 31, 2014 or until the criminal action is tried to verdict, whichever is earlier." (Italics added.) The stay did not mention a stay service of the complaint.

The omission of any reference to stay of service of the complaint in this case distinguishes it from a case that plaintiffs rely on, namely *Highland Stucco & Lime, Inc. v. Superior Court* (1990) 222 Cal.App.3d 637. *Highland Stucco* involved complex litigation with "numerous defendants" accused of selling asbestos-containing products used in approximately 10,000 school buildings in the Los Angeles school district. (*Id.* at p. 639.) To prevent the complex litigation from becoming unwieldy, the trial court issued a stay that provided: " '[P]laintiff is prohibited from serving any defendant not served on or before January 20, 1984. This stay affects and precludes service of additional defendants by plaintiff from and after January 20, 1984 for the purposes of computing the time periods set forth in . . . [s]ection[s] 581(a) and 583.210 through 583.250.' " (*Id.* at pp. 640-641.) Rather than holding that a stay of an action automatically includes a stay on service of a complaint, *Highland Stucco* confirms the distinction between a stay of an action and a stay of service of a complaint.

We are not persuaded by plaintiffs' argument that service of the complaint "would have resulted in responsive pleadings, discovery being served, and depositions being noticed" so that Robert would have been prejudiced by having to litigate both this civil action and his criminal charges at the same time. This argument overlooks the fact there

was a stay of the action that could have lasted until Robert's criminal action culminated in a jury verdict. Moreover, the delay in service of the complaint resulted in a presumption of prejudice *to the defendants*. "Prejudice is presumed from unexplained delay, particularly in serving the complaint." (*Terzian v. County of Ventura* (1994) 24 Cal.App.4th 78, 83.) As in *Terzian*, defendants in this case "did not have to show actual prejudice where there has been an unjustified delay in service of the summons and complaint of almost three years." (*Ibid.*; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 332.) Consequently, the presumption of prejudice resulting from the long delay in service of the complaint supports the trial court's dismissal of the action.

The trial court found the stay did not prevent plaintiffs from serving the complaint, even during the time the stay of the action was in place. Based on the wording of the trial court's stay, we agree nothing rendered service of the complaint impracticable, futile, or impossible. Accordingly, the trial court correctly dismissed the action for failure to serve the complaint within three years of its filing.

C.

Estoppel

Plaintiffs argue the doctrine of estoppel applies to bar the dismissal of their action. They reason statements by the clerk of the superior court support their invocation of the doctrine of estoppel. " '[T]he doctrine of equitable estoppel is a rule of fundamental fairness whereby a party is precluded from benefiting from his [or her] inconsistent conduct which has induced reliance to the detriment of another.' " (*In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 352, quoting *In re Marriage of Valle* (1975) 53 Cal.App.3d 837, 840-841.) In this case, plaintiffs did not argue this issue in the trial court. Consequently, the argument has not been preserved for appellate review.

Generally, a party must present an argument in the trial court to preserve the issue for review. (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) On this point, we note that "the existence of either estoppel or waiver *is a question of fact for the trial court,* whose

determination is conclusive on appeal unless the opposite conclusion is the only one that we can reasonably draw from the evidence." (*In re Marriage of Turkanis & Price*, *supra*, 213 Cal.App.4th at p. 353, italics added.) Because plaintiffs in this case did not assert the specific elements of equitable estoppel to the trial court, the trial court made no factual findings regarding equitable estoppel, and the issue is not preserved for appeal. (*Ibid*.)

III

Motion to Set Aside

Plaintiffs argue the trial court erred in denying their motion to set aside the judgment of dismissal under section 473, subdivisions (b) and (d). Plaintiffs assert they should be excused from their attorney's inadvertent mistake in not serving the complaint on a timely basis. Acknowledging they are not entitled to relief under the mandatory provision of section 473, they contend the trial court abused its discretion in not granting them discretionary relief from the dismissal. We are not persuaded.

A.

Plaintiffs' Motion

The trial court dismissed the action against the State defendants on April 14, 2017, and dismissed the action against the City defendants on May 10, 2017. On April 25, 2017, plaintiffs filed a motion to set aside the dismissal under section 473. All defendants opposed the motion, which the trial court denied after a hearing. The trial court found that the " 'motion to set aside' is, in substance, a motion for reconsideration" of the judgments of dismissal and plaintiffs did not "make the requisite showing for reconsideration." The trial court noted the basis for plaintiffs' motion to set aside was the same as they advanced in opposing the motions to dismiss filed by the defendants.

As to plaintiffs' inadvertent mistake claim, the trial court determined the mistake was not excusable. In so determining, the trial court rejected plaintiffs' contentions that their attorney was relieved of the duty to timely file the complaint because he relied on the advice of a courtroom clerk and the stay that had been put in place at the outset of the

case. The trial court also rejected plaintiffs' claim that it was the "Court's clerical mistake for not issuing a Minute Order or noting the matter was stayed, including service of process, until the conclusion of the criminal proceedings." The trial court found that it had not made a clerical mistake in refusing to issue a new minute order.

B.

Section 473, Subdivision (b)

Subdivision (b) of section 473 provides, in pertinent part, that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." Subdivision (b) was addressed by this court in *Bernasconi Commercial Real Estate v. St. Joseph's Regional Healthcare System* (1997) 57 Cal.App.4th 1078. *Bernasconi* involved an appeal from a denial of a motion to set aside a dismissal premised on the plaintiff's failure to serve a complaint within three years. (*Id.* at pp. 1080-1081.) This court held that "section 473 does not mandate relief from dismissal for failure to serve a complaint within three years (§ 583.210 et seq.) where the plaintiff's counsel files an affidavit avowing fault." (*Id*. at p. 1080, fn. omitted.) *Bernasconi* reasoned that "section 473 may be reconciled with the discretionary dismissal statutes only if limited to those dismissals which are the procedural equivalent of defaults—i.e., those which occur because the plaintiff's attorney has failed to oppose a dismissal motion." (*Id.* at p. 1082.)

Here, the plaintiffs opposed the motions to dismiss filed by the State and City defendants. The dismissal was not due to the failure of plaintiffs' attorney to oppose the defendants' motions to dismiss. Consequently, section 473 does not offer plaintiffs a basis for attacking the dismissals. "This case was not a default but rather a motion lost, on its merits, after opposition was filed. Section 473 was not meant to apply to these facts." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 683.) Accordingly, the trial court did not err in denying the motion to set aside under subdivision (b) of section 473.

C.

Section 473, Subdivision (d)

Plaintiffs also argue the trial court should have granted their motion to set aside under subdivision (d) of section 473. This argument lacks merit.

Subdivision (d) of section 473 provides: "The court may, upon motion of the injured party, or its own motion, correct *clerical mistakes* in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order." (Italics added.) Subdivision (d) does not provide a trial court with the power to make a substantive change to its judgment. "The controlling principle is that although clerical error may freely be corrected postjudgment, judicial error may be corrected only by normal procedures for attacking a judgment (motion for new trial, appeal, independent action in equity, etc.)." (*Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 117 (*Tokio Marine*).)

Here, the trial court dismissed plaintiffs' action based on reasoning that relied on sections 583.210 and 583.410. "The test which distinguishes clerical error from possible judicial error is simply whether the challenged portion of the judgment was entered inadvertently (which is clerical error) versus advertently (which might be judicial error, but is not clerical error)." (*Tokio Marine, supra,* 75 Cal.App.4th at p. 117.) In the absence of clerical error, the trial court did not err in rejecting plaintiffs' motion to set aside based on subdivision (d), of section 473.

DISPOSITION

The judgments of dismissal are affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

/s/
HOCH, J.

We concur:

/s/
HULL, Acting P. J.

/s/
MURRAY, J.